In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 842

ISIDORE S. ROSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13–15; R. II, 45–47)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1965 (Pet. App. 13; R. II, 48). The petition for a writ of certiorari was filed on December 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R. I" refers to the appellant's appendix in the court of appeals. "R. II" refers to the government's appendix.

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QUESTIONS PRESENTED

1. Whether petitioner's constitutional privilege against self-incrimination and right to assistance of counsel were violated when, after being duly warned, he was questioned before a grand jury.

2. Whether petitioner's perjury indictment was void for vagueness.

STATEMENT

In the United States District Court for the Eastern District of New York, petitioner was charged in a four-count indictment with having committed perjury in violation of 18 U.S.C. 1621 before a grand jury which had been inquiring into corruption by federal employees involved with the building industry (R. I, 4–7). The jury found petitioner guilty on count 2,[2] and he was sentenced to imprisonment for one year and one day (R. I, 8). On appeal (R. I, 9) the conviction was affirmed (Pet. App. 13; R. II, 48).

Petitioner was called to testify before the grand jury on May 15, 1963 (R. II, 13–26). Government counsel told petitioner at that time that he was the subject of a grand jury investigation inquiring into, among other things, his conduct in his official capacity as an employee of the Federal Housing Administration. Petitioner said that he understood this, and also understood that as a prospective defendant anything he might say before the grand jury could be used against him at a later proceeding (R. II, 13–

[2] Pursuant to a motion to elect, the case was submitted to the jury solely on count 2 (R. I, 28–30).

14). The following colloquy between the government counsel and petitioner ensued (R. II, 14–15):

> Q. Do you understand you need not testify as to those matters which would tend to incriminate you, that is to say, you cannot be compelled to testify against yourself, as is provided in the Fifth Amendment to the United States Constitution. Do you understand?
>
> A. Yes, sir.
>
> Q. This is not to say, however, that you can refuse to testify if you desire to do so. Do you understand?
>
> A. Yes, sir.
>
> Q. Nor is it to say that you can refuse to testify as to matters that may incriminate others than yourself. Do you understand?
>
> A. Yes, sir.
>
> Q. But as I have already stated to you, if what you would testify to would incriminate not only others than yourself, but yourself as well, you need not testify. Do you understand?
>
> A. Yes, sir.
>
> Q. Do you further understand that when you testify before a Federal Grand Jury that you must tell the truth, and that if you do not tell the truth you render yourself liable to prosecution for perjury. Do you understand that?
>
> A. I understand.

Petitioner then signed a waiver of immunity with regard to the testimony he was to give before the grand jury (R. II, 15–17).

Petitioner was asked before the grand jury to define the word "gratuity", and he replied that it

however, that advice regarding assistance of counsel is constitutionally required, the observation made by the court below in *United States* v. *Winter, supra,* 348 F. 2d at 208, is appropriate: "[E]ven if [petitioner] were entitled, as a matter of constitutional right, to be advised that he could consult with counsel prior to testifying before the grand jury, omission so to advise him is no defense to a charge that he thereafter perjured himself in the grand jury room." See *United States* v. *Parker,* 244 F. 2d 943, 945–949 (C.A. 7), certiorari denied, 355 U.S. 836; *United States* v. *Orta,* 253 F. 2d 312 (C.A. 5), certiorari denied, 357 U.S. 905; *United States* v. *Williams,* 341 U.S. 58, 65–69; *United States* v. *Remington,* 208 F. 2d 567 (C.A. 2), certiorari denied, 347 U.S. 913.

2. Count 2 of the indictment was not impermissibly vague. It was not necessary to plead the evidentiary details regarding the precise time, place and persons from whom petitioner had accepted gratuities. Before the grand jury petitioner had defined a "gratuity" as a "gift of any kind", including money, liquor, or anything else of value. He then admitted having received some liquor in 1954 or 1955, but denied having taken any gratuities from builders, specifically from 1958 through the date of his grand jury testimony on May 15, 1963. At the trial many builders testified that petitioner had accepted gratuities during a period beginning in 1959. In this context, as the court below properly held (Pet. App. 15), the part of the question set out in count 2—"Have you had occasion to accept," clearly meant "Have you, on any occasion, accepted" gratuities.

The indictment contained "a plain, concise and definite written statement of the essential facts constituting the offense charged" (Rule 7(c), F.R. Crim. P.) so that petitioner was apprised of the charge, could prepare his defense, and plead the judgment in bar of any further prosecutions for the same offense. *United States* v. *Debrow,* 346 U.S. 374, 378. This is particularly true since petitioner waited until after the verdict to attack the specificity of the indictment. The claim clearly could not first be made on appeal. *Hagner* v. *United States,* 285 U.S. 427, 433.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966